

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY A. DAUGHERTY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States
Board of Tax Appeals.

FILED
JUN 20 1932
PAUL F. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY A. DAUGHERTY,

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES:

For Petitioner: ALBERT L. HOPKINS, Esq.

JAY C. HALLS, Esq.

SAMUEL H. HORNE, Esq.

For Respondent: F. R. SHEARER, Esq.

DOCKET ENTRIES.

1928.

Dec. 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Dec. 17—Copy of petition served on General Counsel.

1929.

Jan. 31—Answer filed by General Counsel.

Feb. 20—Copy of answer served on taxpayer—General Calendar.

Oct. 18—Motion to place on the Chicago, Ill., circuit calendar filed by taxpayer. 10/-21/29 granted.

1930.

June 25—Hearing set July 18, 1930, at Milwaukee, Wisc.

*Page-number appearing at the top of page of original certified Transcript of Record.

1930.

July 15—Hearing held before Mr. S. J. McMahon, Div. 16, on merits. Petitioner's brief due Oct. 1, 1930; reply Oct. 25, 1930, and respondent's brief due Oct. 15, 1930.

July 31—Transcript of hearing of July 15, 1930, filed.

Sept. 30—Brief and proposed findings of fact filed by taxpayer. 10/11/30 copy served on General Counsel.

Oct. 15.—Brief filed by General Counsel.

Oct. 25.—Reply brief filed by taxpayer.

Oct. 28—Copy of reply brief served on General Counsel.

1931.

Oct. 29—Findings of fact and opinion rendered—S. J. McMahon, Div. 16. Judgment will be entered for respondent. Trammell dissents; Smith agrees with dissent.

Oct. 31—Decision entered—S. J. McMahon, Div. 16.

Dec. 15—Motion to fix amount of bond in the amount of \$18,000 filed by taxpayer.

Dec. 16—Order fixing amount of bond at \$18,500.00 entered.

1932.

Feb. 11—Supersedeas bond in the amount of \$18,500.00 approved and ordered filed.

[2] 1932.

Feb. 11—Petition for review to U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Feb. 11—Proof of service filed.

1932.

Mar. 29—Stipulation for extension to May 11, 1932, to settle evidence and transmit record filed.

Mar. 30—Order enlarging time to May 11, 1932, for preparation of evidence and delivery of record entered.

Apr. 20—Statement of evidence lodged.

Apr. 20—Notice of the lodgment of statement of evidence with hearing set 5/4/32 filed.

Apr. 20—Praecipe filed—proof of service thereon.

Apr. 20—Proof of service of statement of evidence with notice of hearing on 5/4/32 filed by taxpayer.

May 4—Notice of appearance of Samuel H. Horne as counsel for taxpayer filed.

May 4 & 5—Hearing had before S. J. McMahon, Division 16, on approval of statement of evidence. Amendment to answer filed. Statement approved.

May 10—Order enlarging time to June 11, 1932, for transmission and delivery of record *sur* petition for review entered.

May 5—Statement of evidence approved and filed.

[3] Filed Dec. 15, 1928.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-9:ML-60D) dated October 17, 1928, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 424 Melrose Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on October 17, 1928.

3. The taxes in controversy are income taxes for the calendar year 1926 and for the amount of \$12,416.40.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner erred in including in the income of petitioner for the year 1926 the amount of \$47,180.28

paid in that year to the wife of the petitioner for her share or interest in a certain contract.

[4] 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to the making of the gift hereinafter described, the petitioner and certain other attorneys had entered into a contract with one Estelle G. Holland and her husband, by which contract the petitioner and said other attorneys were retained to establish the interest, if any of said Estelle G. Holland in a certain trust estate and were to receive as their fees for their services in that behalf a certain proportion of whatever amount should be awarded to or received by said Estelle G. Holland from said trust estate.

(b) On or about January 30, 1924, the petitioner by gift in writing, transferred to Elizabeth M. Daugherty his wife, one-half of his interest in and to said contract. The said gift by petitioner to his said wife of said interest in the said contract was outright and unconditional and without reservation of any interest therein or any control thereof on the part of the petitioner.

(c) At the time of said gift the litigation to which said contract related was pending and undetermined. No settlement had then been arrived at and there was then no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of said gift the value of petitioner's interest in said contract and the value of the interest transferred by petitioner

to his said wife was wholly contingent and undeterminable.

(d) Thereafter, the litigation to which said contract related [5] was terminated by settlement or compromise. In the year 1926 the proceeds of the share or interest in the said contract transferred as aforesaid to the wife of petitioner were paid directly to said wife and not to the petitioner and were received and held by the said wife of petitioner as her own separate property and for her own separate use and disposal. The amount so paid to the wife of petitioner was \$47,180.28.

(e) The Commissioner in determining the proposed deficiency for 1926 included in the income of the petitioner for that year the said amount of \$47,180.28 paid to and received by the wife of petitioner as aforesaid.

WHEREFORE, the petitioner prays that the Board may hear the proceeding and may redetermine that the said amount of \$47,180.28 was not income of the petitioner for the year 1926 and may grant such other and further relief as shall appear proper.

(Signed) ALBERT L. HOPKINS,
THOS. P. DUDLEY, Jr.,
Counsel for Petitioner,
110 S. Dearborn St.,
Chicago, Illinois.

(Signed) RICHARD S. DOYLE,
Counsel for Petitioner,
906 Southern Bldg.,
Washington, D. C.

[6] State of Illinois,
County of Cook,—ss.

Thomas P. Dudley, Jr., being first duly sworn on his oath, deposes and says that he is one of the attorneys for the above-named petitioner and is duly authorized to execute this petition for and on behalf of the said petitioner; that the said petitioner is absent from the City of Chicago, Illinois, where he resides and is not expected to return to the said city until after the time for the filing of this petition shall have expired; that affiant executes this affidavit because of the said absence of the petitioner and the said inability of said petitioner to execute this affidavit within the time allowed for the filing of this petition; that affiant has read the foregoing petition and is familiar with the statements contained therein, and that the same are true to the best of his knowledge, information and belief.

(Signed) THOMAS P. DUDLEY, Jr.

Subscribed and sworn to before me this 14th day of December, 1928.

[Seal] (Signed) RHEA E. BIRNEY,
Notary Public.

EXHIBIT "A."

[7] TREASURY DEPARTMENT,
Washington.

Office of
Commissioner of Internal Revenue.

October 17, 1928.

Mr. Harry A. Daugherty,
Apartment 9-H,
424 Melrose Street,
Chicago, Illinois.

Sir:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1925 and 1926 discloses a deficiency of \$12,416.40, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

B. H. BLAIR,
Commissioner.

By C. B. ALLEN,
Deputy Commissioner.

Enclosures:

- Statement—
- Form 866.
- Form 882.

[8] STATEMENT.

Oct. 17, 1928.

IT:AR:B-9.
ML-60D.

In re: Mr. Harry A. Daugherty
Apartment 9-H,
424 Melrose Street,
Chicago, Illinois.

Year.	Deficiency in Tax.
1925	None.
1926	\$12,416.40
	\$12,416.40
TOTAL	\$12,416.40

The report of the Internal Revenue Agent in Charge at Chicago, Illinois, has been reviewed by this office. Your returns have been adjusted as follows:

1925.

Tax liability shown by return.....	\$1,455.00
Proposed deficiency	none

Tax liability included on Form 866.....\$1,455.00

1926.

Net Income.

Net income reported on return.....\$90,311.36

Add:

1. Dividends	\$3,665.75	
2. Assigned income	47,180.28	\$50,846.03

Total		\$141,157.39
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Deduct:

3. Dividends on life insurance.....		59.74
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Net income as adjusted.....		\$141,097.65
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Computation of Tax.

Net income adjusted.....		\$141,097.65
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[9] STATEMENT.

Mr. Harry A. Daugherty.

Brought forward		\$141,097.65
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Less:

Dividends	\$8,894.03	
Personal exemption.....	3,500.00	12,394.03

Income subject to normal tax.....		\$128,703.62
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Normal tax at 1½% on \$4,000.00.....		60.00
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Normal tax at 3% on \$4,000.00.....		120.00
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Normal tax at 5% on \$120,703.62.....		6,035.18
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Surtax on \$141,097.65.....		19,879.53
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Total tax		\$26,094.71
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Less:

Earned income credit.....		206.25
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Tax assessable (Amount included on Form 866)	\$25,888.46
Tax previously assessed	13,472.06
	<hr/>
Deficiency in tax	\$12,416.40

Explanation of Changes.

1. Dividends of \$3,665.75 accrued and applied on the purchase price of stocks under a stock purchasing plan were omitted from your return for the year the stock was made available.

2. The amount of \$47,180.28 representing one-half of compensation for your services as attorney in a suit to construe a will, has been eliminated from your wife's return and included on *your*. It is held by this office that the fee was the original interest which you assigned to your wife and that the entire amount was taxable to you. This adjustment is similar to that referred to in Solicitor's Memorandum 2762, published in Internal Revenue Cumulative Bulletin III-2, page 53.

3. The amount of \$59.74 representing dividends on life insurance, has been eliminated as nontaxable in accordance with Article 47 of Regulations 69, relative to the Revenue Act of 1926.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[10] Filed Jan. 31, 1929.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the petition.
2. Admits all the material allegations contained in paragraph 2 of the petition.
3. Admits all the material allegations contained in paragraph 3 of the petition.
- 4(a). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.
- 4(b). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated October 17, 1928.
5. Denies all the material allegations contained in paragraph 5 of the petition.
6. Denies generally and specifically each and every allegation in the petitioner's petition con-

tained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

[11] United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO ANSWER.

Comes now the Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and pursuant to and in accordance with leave granted at the hearing of July 15, 1930 (Tr., page 35), amends the answer heretofore filed on January 31, 1929, by substituting in lieu of paragraph 5 of the answer as it now appears the following:

“5. Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition; but denies the remaining allegations contained in paragraph 5 of the petition.”

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

F. R. SHEARER,
Special Attorney,
Bureau of Internal Revenue.

A true copy.

[Seal]

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Allowed and ordered filed this 5th day of May,
1932.

(Signed) STEPHEN J. McMAHON,
Member.

[12] 24 B. T. A. —.

United States Board of Tax Appeals.

DOCKET No. 41,905.

Promulgated October 29, 1931.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

FINDINGS OF FACT AND OPINION.

Petitioner, an attorney, and other attorneys contracted in writing to conduct law proceedings to establish the rights of an individual in a certain trust estate. Said contract provided that the attorneys were to share equally in 40 per cent of any amount which might be recovered for the client. It was understood and orally agreed among all the parties concerned that petitioner should not be required to render any services in such litigation, subsequent to the making of the contract, in order to receive his portion of the amount recovered, and he did not render services subsequently. He had rendered some professional services previous to the making of the contract. Before any amount was recovered and before there was any assurance that any would be recovered, petitioner made a gift to his wife of one-half of his interest in the contract. Later an amount was recovered and a portion thereof was paid to petitioner's wife in accordance with the assignment of the contract interest to her. Held, that such amount as petitioner's wife was entitled to and received under the assignment is taxable to petitioner, following *Lucas vs. Earl*, 281 U. S. 111; *Edward J. Luce*, 18 B. T. A. 923; and *John Leo Stack*, 22 B. T. A. 707.

JAY C. HALLS, Esq., and E. H. McDERMOTT, Esq., for the Petitioner.

F. R. SHEARER, Esq., for the Respondent.

This is a proceeding for the redetermination of

an asserted deficiency in income tax for the calendar year 1926 in the amount of \$12,416.40. It is alleged that the respondent erred in including [13] in petitioner's income for the year 1926 the amount of \$47,180.28, paid in that year to the wife of the petitioner for her share or interest in a certain contract.

FINDINGS OF FACT.

The petitioner is an individual residing in Chicago, Illinois.

Petitioner was admitted to practice law in Illinois in 1896. For several years thereafter he was engaged in the general practice in Chicago. In 1915, petitioner was employed as one of the general attorneys of the Standard Oil Company of Indiana. Thereupon he retired from the general practice and had his office in the general offices of that company.

Prior to his employment by the Standard Oil Company of Indiana, while engaged in general practice, petitioner had acted as attorney for Mrs. Estelle Howland (then Mrs. Estelle Jennings) daughter-in-law of John D. Jennings and sister-in-law of Edwin Jennings. In about 1912 petitioner and Robert J. Fologie were engaged in litigation to establish Mrs. Howland's rights in connection with the trust estate created by John D. Jennings, who died in 1889. Petitioner and Fologie spend a great amount of time and effort on the case, which was strenuously contested, but finally the litigation terminated unsuccessfully to Estelle Howland in the Appellate Court of Illinois. Certain adverse interests were represented by the law firm of Camp-

bell and Fischer of Chicago, of which John G. Campbell was a member.

[14] On October 31, 1923, Edwin Jennings, the last surviving son of John D. Jennings, died. Learning of his death, Campbell called petitioner on the telephone and asked him if he still represented Mrs. Howland and petitioner stated that he did. Campbell then stated that in connection with the prior litigation he had studied and briefed the question of Mrs. Howland's rights in the trust estate and that he had reached the conclusion that in view of the death of Edwin Jennings, Mrs. Howland was entitled to a substantial interest therein. Campbell offered to give this brief to petitioner. Petitioner said he would ascertain the wishes of his client with regard to the matter, but that in no event could he handle litigation for her, because his position with the Standard Oil Company of Indiana occupied all of his time and attention. It was orally agreed between Campbell and petitioner that petitioner would not engage in any of the litigation, but that petitioner was simply to furnish the client.

On November 3, 1923, Mrs. Howland conferred with petitioner and informed him that she desired proceedings instituted to establish her rights in the trust estate. At a conference between Mrs. Howland, her husband, petitioner and Campbell at petitioner's offices in the Standard Oil Company building in Chicago, it was agreed that a bill to construe the will should be filed; that all of the work in connection with the proceedings should be performed by Messrs. Campbell and Fischer, and that there

should be paid to the attorneys an amount equivalent to 40 per cent of whatever might be recovered for Mrs. Howland, this amount to be divided equally [15] between Campbell, Fischer, petitioner, and R. J. Folonie, whose name was suggested by petitioner because of his connection with petitioner in the prior unsuccessful litigation for Mrs. Howland. An agreement in writing was entered into as follows:

Chicago, Ill., Nov. 5, 1923.

I hereby appoint HARRY A. DAUGHERTY, ROBERT J. FOLONIE, JOHN G. CAMPBELL AND HERMAN A. FISCHER, Jr., to act as my solicitors and attorneys in all matters pertaining to my interest in the Trust Estate founded by the last Will of John D. Jennings, deceased. They are authorized to commence or participate in, any proceedings they deem necessary in order to establish my interest therein. As their full compensation for services they are to receive an amount equal to forty per cent (40%) of any money or property I am awarded or receive, in connection with the subject matter of said Trust Estate; it being agreed and understood that this compensation is to be in addition to any fees which may be awarded, either to me on account of my solicitors' fees, or directly to my solicitors, by any Court, from the Trust Estate as a whole, on account of legal services rendered by them in any suit or suits which they instituted or participated in involving the subject matter above mentioned, but does not include anything which I may receive directly from the estate of Edwin Jennings, deceased, as distinguished from

said Trust Estate, found by the Will of John D. Jennings, deceased.

(Signed) ESTELLE G. HOWLAND,
FRANCIS H. HOWLAND,
Hoboken, N. J.

Accepted:

HARRY A. DAUGHERTY,
ROBERT J. FOLONIE,
JOHN G. CAMPBELL,
HERMAN A. FISCHER, Jr.,
By H. A. DAUGHERTY.

It was agreed between the attorneys and Mrs. Howland that petitioner and Folonie would be required to do no work whatever in connection with the case.

[16] On November 3, Campbell and Fischer filed the bill to construe the will. There were numerous parties to the litigation and a great deal of time and effort was put on the case by Campbell and Fischer. No time whatever was put in on the case and no work of any kind was done on the case by petitioner or by Folonie, although Campbell signed petitioner's and Folonie's names to the pleadings in the litigation.

On January 30, 1924, petitioner wrote a letter to his wife, enclosing petitioner's copy of the original contract with Mrs. Howland. On the margin of such contract petitioner endorsed an assignment in long-hand as follows:

Chicago, Ill., Jan. 30, 1924.

In consideration of love and affection, I hereby assign to Elizabeth M. Daugherty, my wife, an un-

divided one-half of my interest in and to this contract.

HARRY A. DAUGHERTY.

The letter and the contract with the assignment endorsed thereon were delivered by petitioner to his wife on the evening of January 30 and were retained by her in her private desk at home until requested by petitioner for use in connection with the controversy over petitioner's income tax liability. Petitioner orally advised Campbell of the assignment some time in 1925. The letter from petitioner to his wife was as follows:

Dear Bess:

You have often expressed the desire to build a home according to your own plans, and I had hoped to [17] be able to be in a position to make it possible for you to realize your dream. However, circumstances have always seemed to prevent it. Some two or three months ago I made a contract with Estelle G. Howland of Ho-Ho-Kus, New Jersey, whom I had previously represented in some litigation, to represent her in connection with Mr. R. J. Folonie, J. G. Campbell and H. A. Fischer, Jr., in the prosecution of her claim against the estate of John G. Jennings, deceased, the same to be handled upon a contingent basis of 40% of the amount she might realize, said 40% to be divided equally between the above-named parties.

If we are successful, Mrs. Howland will realize a very substantial amount, and the contingent fee will be correspondingly large. I am therefore assigning to you an undivided one-half interest in

my share of whatever fees may be coming to me under the contract. I hope it will be sufficient to enable you to build the home, or if you should decide not to use it in that way, then I want you to feel at liberty to use the money in any way you see fit.

I am attaching hereto a copy of the agreement on which I have noted your interest.

With all my love, I am as ever,

(Signed) HARRY.

At the time of the gift the litigation to which the contract related was pending and undetermined. No settlement had then been arrived at and there was then no assurance that the litigation would terminate successfully or that any settlement could be made. At the time of the gift the value of petitioner's interest in the contract and the value of the interest transferred by petitioner to his wife was wholly contingent and undeterminable.

In June, 1926, as a result of negotiations between the parties, in which petitioner in no way participated, a settlement of the litigation was agreed upon, by the terms of which \$943,605.60 was awarded [18] to Mrs. Howland in satisfaction of her claim. Pursuant to the contract of employment, 40 per cent thereof, or \$377,442.24, was duly paid to Campbell and Fischer. Campbell called petitioner to his office in order to figure out just what each attorney was entitled to receive. Petitioner's wife was not invited to such conference. On June 22, 1926, Campbell delivered to petitioner a check in his favor in the amount of \$47,180.28 and a check in favor of Mrs. Daugherty in the amount of \$47,180.28.

Mrs. Daugherty deposited (or caused to be deposited) this check in an account which she opened in the Illinois Merchants Trust Company, a downtown bank in Chicago. She invested the money in stocks, secured the certificates in her own name, and deposited them in her private safe deposit box. She used the dividends of the stocks entirely for her own purposes and she did not contribute in any way to the household expenses, nor did petitioner derive any benefit whatsoever from the money paid to his wife nor from the securities purchased therewith nor from the dividends received by Mrs. Daugherty on such securities.

In determining the proposed deficiency for 1926 the respondent included in petitioner's income the amount of \$47,180.28 received by petitioner's wife.

OPINION.

McMAHON.—The question presented is whether the respondent erred in including in petitioner's taxable income for the year 1926 the amount of \$47,180.28, which was paid to petitioner's wife as a result of petitioner's unqualified assignment to her of an undivided [19] one-half interest in the contract of November 5, 1923, with Estelle G. Howland.

Respondent takes the position that the income in question constitutes compensation paid by or on behalf of Mrs. Howland to petitioner for his personal services as attorney, and contends that such income was first taxable income to petitioner, citing *Lucas vs. Earl*, 281 U. S. 111.

After carefully considering the evidence in the instant proceeding we are of the opinion that the income in question amounted to compensation paid to petitioner for personal services rendered to Mrs. Howland. It is true that petitioner regarded his a nominal representation and there was an understanding, among all the parties concerned in the suit, that petitioner should not be required to render further services with regard to the prosecution of the suit after the contract was entered into. Petitioner did not in fact render services after such time but the evidence discloses that prior to the time the contract was entered into petitioner had rendered some professional services. At the time of the agreement petitioner still represented Mrs. Howland as attorney. At the suggestion of Campbell to petitioner that Mrs. Howland was entitled to a substantial interest in the trust estate, petitioner conferred with her, and brought Campbell and Fischer into the contemplated litigation in her behalf. It is reasonable to infer that he gave her some advice upon the subject. He was present at the conference when it was decided to proceed with the litigation. Under the agreement in question Mrs. Howland agreed that the attorneys, including petitioner, should receive [20] an amount equal to 40% per cent of any money or property she might be awarded as full compensation for services. The case, then, falls within the principle laid down in *Lucas vs. Earl, supra*, wherein it was held that under the Revenue Acts of 1918 and 1921 income derived from salaries, wages or

compensation for personal services are taxable to the person earning the same, even though there was a pre-existing arrangement between such person and his wife to the effect that all such income should be treated as owned by them as joint tenants. The Revenue Act of 1926, with which we are here concerned, is not different in this regard from the Revenue Acts of 1918 and 1921. See sections 210, 211, 212(a) and 213(a) of the Revenue Act of 1926. To the same effect, in principle, are *Edward J. Luce*, 18 B. T. A. 923, and *John Leo Stack*, 22 B. T. A. 707.

The petitioner cited *Copland vs. Commissioner*, 41 Fed. (2d) 501; *Eugene Seigel, Executor*, 20 B. T. A. 563; *Rosenwald vs. Commissioner*, 33 Fed. (2d) 423, and *Shellaberger vs. Commissioner*, 38 Fed. (2d) 566. However, those cases are clearly distinguishable from the instant proceeding, since these cases did not deal with the assignment of income derived from salaries, wages or compensation for personal services.

We hold that the respondent did not err in including the amount in question in petitioner's taxable income.

Reviewed by the Board.

Judgment will be entered for the respondent.

TRAMMELL, Dissenting.—In my opinion, the *res* which gave rise to the income was assigned, not the income from the contract. This distinguishes this case from the principle of the *Earl* case.

SMITH agrees with this dissent.

[21] United States Board of Tax Appeals,
Washington.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 29, 1931,—

IT IS ORDERED and DECIDED: That there is a deficiency of \$12,416.40 for the calendar year 1926.

(Signed) STEPHEN J. McMAHON,
Member.

Entered: Oct. 31, 1931.

A true copy.

[Seal]

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[22] Filed Feb. 11, 1932. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:
Your petitioner, Harry A. Daugherty, respectfully shows:

I.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of the United States Board of Tax Appeals, entered on October 31, 1931, re-determining a deficiency in income taxes for the calendar year 1926 in the amount of \$12,416.40.

II.

The petitioner is an individual and is an inhabitant of the City of Los Angeles, California.

[23] III.

The nature of the controversy is as follows:

The petitioner, an attorney, and other attorneys entered into a contract with one Estelle Howland on November 5, 1923, to represent her in connection with her claim to an interest in a certain trust

estate. The contract provided that the attorneys were to receive forty per cent of the amount which might be recovered. It was understood and agreed among all the parties concerned that petitioner should not be required to render any services in said litigation subsequent to the making of the contract, and he did not subsequently render any services. On January 30, 1924, before any amount was recovered and before there was any assurance that any amount would be recovered, petitioner assigned to his wife a one-half interest in the contract. In 1926, a substantial recovery was obtained and there was paid to the wife of petitioner \$47,180.28, the amount payable to her in accordance with the assignment of the contract. The Commissioner of Internal Revenue has increased petitioner's income for 1926 by the amount of \$47,180.28 which was paid to the wife of petitioner, which increase in income resulted in the deficiency complained of.

IV.

The United States Board of Tax Appeals committed the following errors upon which petitioner relies as the basis of [24] this proceeding:

1. Upon the findings of fact made by the Board of Tax Appeals, the Board erred in not holding as a matter of law that the amount of \$47,180.28 received in 1926 by the wife of petitioner was not income taxable to the petitioner.

2. Upon the undisputed evidence presented to the Board of Tax Appeals, the Board erred in not holding as a matter of law that said amount of

\$47,180.28 paid to petitioner's wife in 1926 did not represent taxable income to petitioner.

3. The Board of Tax Appeals erred in failing to find from all the evidence that the amount of \$47,180.28, paid to the wife of petitioner in 1926, did not constitute taxable income to petitioner.

WHEREFORE, your petitioner prays that this court may review the findings of fact, opinion and order of redetermination of the Board of Tax Appeals and reverse the decision of said Board because of the errors aforesaid and direct said Board to redetermine the deficiency, if any, against the petitioner in accordance with law and the evidence, and that this court may grant such other and further relief as to it may appear proper in the premises.

(Sgd.) ALBERT L. HOPKINS,
JAY C. HALLS,
Attorneys for Petitioner.

[25] State of California,
County of Los Angeles,—ss.

Harry A. Daugherty, being first duly sworn, on oath deposes and says that he is the petitioner named in the foregoing petition for review; that he has read the said petition for review and is familiar with the same and that the statements therein contained are true to the best of his knowledge and belief; that he verily believes that he is entitled to the relief therein prayed for and that said petition for review is not filed for purposes of delay.

(Sgd.) HARRY A. DAUGHERTY.

Subscribed and sworn to before me this 2d day of February, A. D. 1932.

[Seal] (Sgd.) M. MAUDE MARRISON,
Notary Public.

[26] Lodged Apr. 20, 1932. United States Board of Tax Appeals.

Filed May 5, 1932. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE.

The above-entitled cause came on for hearing before Honorable Stephen J. McMahan, member of the United States Board of Tax Appeals, on July 15, A. D. 1930, at Milwaukee, Wisconsin, pursuant to notice of hearing theretofore given, there being present the petitioner by his counsel, Jay C. Halls, Esq., and Edward H. McDermott, Esq., and the respondent by his counsel, F. R. Shearer, Esq.

Thereupon, the following proceedings were had and testimony heard by said member. All of the evidence introduced by both parties in the above-entitled cause which is material and necessary to

the determination of the assignments of error set forth by petitioner in its petition for review by the Circuit Court of Appeals of the decision of the Board of Tax Appeals is herein set out in narrative form, except where, for a better [27] understanding of the evidence, the questions and answers are set forth. The exhibits referred to in the testimony are set forth or the substance thereof stated herein and made a part hereof.

TESTIMONY OF HARRY A. DAUGHERTY, FOR PETITIONER.

HARRY A. DAUGHERTY, the petitioner, having first been duly sworn as a witness on his own behalf, upon direct examination, testified as follows:

My full name is Harry A. Daugherty. I live in Chicago, Illinois. I am an attorney.

In 1923 I was General Counsel for the Standard Oil Company of Indiana, which position I had held since 1915. In 1923 I devoted all of my time to the affairs of the Standard Oil Company of Indiana. I did not at that time maintain a law office of my own. I was in the Legal Department of the Standard Oil Company at 910 South Michigan Avenue, Chicago, where the company had its general offices.

I was admitted to practice in 1896. I practiced until 1915 in the general practice. For a period of seven years, from 1900 to 1907, I was chief assistant to Mr. Alfred B. Eddy who was General Counsel for the Standard Oil Company.

(Testimony of Harry A. Daugherty.)

I knew Mrs. Estelle Howland. I knew her through handling business for her for probably ten or twelve years before 1923. I handled litigation for her in the courts of Cook County, both the Trial Court and the Appellate Court, in [28] connection with this same Estate of John Jennings.

I had a talk with her in 1923 with reference to representing her in litigation in connection with the Trust Estate created by John Jennings. The first conversation took place in November, 1923, about the day of the contract or a day or two before the contract, which was November 5, 1923.

In stating the circumstances leading up to that conversation I would like to go back a little bit. In the litigation in which I represented her before Mr. John Campbell, a prominent attorney of Chicago, was the attorney for the Equitable Trust Company, which was the Trustee under the Trust Estate of John Jennings, and the litigation in which I represented Mrs. Jennings, who subsequently became Mrs. Howland, was against the Equitable Trust Company, as Trustee of that Estate, and against Edwin Jennings, the surviving son of John Jennings. I am referring to the Equitable Trust Company of Chicago. Afterwards it was dissolved, as I remember it, or it went out of existence in Chicago. Mr. Campbell represented the Equitable Trust Company in that matter and was opposed to Mr. R. J. Folonie and myself, who represented Mrs. Jennings at that time.

In November, 1923, I noticed in the paper that

(Testimony of Harry A. Daugherty.)

Edwin Jennings had died, and when I got down to the office that [29] morning, Mr. Campbell called me up on the phone and said: "Did you know Mr. Jennings died yesterday?" I said that I had just read that, and he said that in that litigation in which we were opposed to each other he was quite interested in figuring out what interest Mrs. Jennings, now Mrs. Howland, had in the Estate in the event of Edwin's death, and he thought she had a very substantial interest—I think he said about a one-third interest in the Estate—and he said: "I will be glad if you represent her," or he said: "Do you still represent her?" and I said: "Yes, I do." He said he would be glad to let me have his brief if I cared for it.

I said: "John, on account of my connection with the Standard Oil Company, to which I have to devote all my time, I am not engaged in general practise any more, and I will not take on any outside cases, but if you are willing to go along and handle the case, I will undertake to get Mrs. Howland here, and I will furnish the client if you will do the work." That was the way I put it up to him, and I said we would go along on a fifty-fifty basis. He said that was entirely satisfactory to him.

Then I happened to remember that Mr. Folonie was interested with me in the other litigation, and I said that Mr. Folonie was with me in the other litigation and I thought it was only fair that he should be taken in on this case because the other litigation did not result in any substantial fees.

(Testimony of Harry A. Daugherty.)

[30] It was mostly hard work. He said Mr. Fischer, his associate, would be associated with him in this case and suggested that we divide the fee four ways.

I said: "That is entirely agreeable if it will be agreeable to Mrs. Howland, and the understanding is now that I will not have anything to do with the litigation. You will handle that and I am simply to get the client here and then turn her over to you." I immediately got in touch with Mrs. Howland, and she came on within a day or two after I sent word to her. Her husband came with her.

I told her the situation and that "I was not in a position to handle the litigation, could not do it on account of my connection with the Standard Oil Company, but I said: 'Mr. John Campbell, who was the attorney for the Trust Company in the litigation you had before, is a very capable lawyer and so is his associate, Mr. Fischer, Herman Fischer, and men of high standing here; I have the utmost confidence in them, and if it is agreeable to you, I will have them handle the matter and I will have nothing further to do with it and they will be responsible for the litigation'." She said: "If you have confidence in them, that is entirely satisfactory to me, and I appreciate the position you are in."

Then I telephoned Mr. Campbell; he came over to the office, and I introduced him to Mrs. Howland and I told Mr. [31] Campbell in the presence of Mrs. Howland and her husband of the conversation I had had with them, as I have just stated,

(Testimony of Harry A. Daugherty.)

and "Mr. and Mrs. Howland both said the arrangement was entirely satisfactory to them."

Mr. Campbell then said he would go back to his office and finish preparing the bill to be filed to construe the will and asked me to draw up a contract, and I did that on behalf of the four attorneys and Mrs. Howland signed it, and then Mrs. Howland went over to Mr. Campbell's office, "and that was the last time I ever saw Mrs. Howland or ever had any talk with her or had anything to do with the matter except when it came to the final adjustment and except that occasionally I would phone Mr. Campbell and ask him in a general way how the case was going. I did not participate in the preparation of any of the pleadings in the case or in the preparation of the bill. I did not appear in court at any time, did not participate in any of the arguments; I was not present at any of the negotiations leading up to the settlement. I absolutely had nothing further to do with it except in connection with the interest I had in the contract."

Mr. HALLS.—"In your conversation with Mrs. Howland did you state to her what your participation in the case would be after the contract was made?"

WITNESS.—"Oh, yes; I told her distinctly that I could not handle the matter and was not in a position to handle it on account of my connection with the company and that Mr. [32] Campbell and Mr. Fischer would handle the entire litigation."

(Testimony of Harry A. Daugherty.)

Mr. HALLS.—“Was that said in the presence of Mr. Campbell?”

WITNESS.—“That was said in the presence of Mr. Campbell when Mrs. Howland and her husband were there.”

(Counsel for petitioner handed Petitioner’s Exhibit No. 1 for identification to the witness and asked the witness what the document was. The witness answered that Petitioner’s Exhibit No. 1 was the original contract between Mr. and Mrs. Howland and the witness, Robert J. Folonie, John G. Campbell and Herman Fischer, Jr.)

WITNESS.—(Resuming.) The original contract was signed November 5, 1923, which is the date it bears.

(The witness then identified the signatures of Estelle G. Howland and Francis Howland on the contract. The witness stated that he made his own signature to the contract and signed the names of the other attorneys, putting a bracket around them by himself, H. A. Daugherty.)

WITNESS.—(Resuming.) The signatures of the other attorneys were made by authority and consent of the other attorneys. That was never questioned, and the contract has never been questioned at all.

(Counsel for petitioner then handed to the witness Petitioner’s Exhibit No. 2 for identification. In response to question the witness stated that Petitioner’s Exhibit No. 2 was a duplicate original of the original contract; that it was [33] signed

(Testimony of Harry A. Daugherty.)

in the same manner in which Petitioner's Exhibit No. 1 for identification was signed and by the same parties.)

Mr. HALLS.—“In whose handwriting does the writing on the left-hand side appear?”

WITNESS.—“That is my handwriting.”

Mr. HALLS.—“When did you put that on the document?”

WITNESS.—“On the date it bears.”

Mr. HALLS.—“What does that state?”

WITNESS.—“January 30, 1924.”

(Petitioner's Exhibit No. 1 for identification was offered and received in evidence without objection as Petitioner's Exhibit No. 1.)

(Said document so offered and received in evidence was marked Petitioner's Exhibit No. 1, and made a part of this record).

(Petitioner's said Exhibit No. 1 is as follows:)

PETITIONER'S EXHIBIT No. 1.

“Chicago, Ill. Nov. 5, 1923.

“I hereby appoint HARRY A DAUGHERTY, ROBERT J. FOLONIE, JOHN G. CAMPBELL and HERMAN A. FISCHER, Jr., to act as my solicitors, and attorneys in all matters pertaining to my interest in the Trust Estate founded by the last will of John D. Jennings, deceased. They are authorized to commence or participate in, any proceedings they deem necessary in order to establish my interest therein. As their full compensation

for services they are to receive an amount equal to forty per cent (40%) of any money or property I am awarded or receive, in connection with the subject matter of said Trust Estate; it being agreed and understood that this compensation is to be in addition to any fees which may be awarded, either to me on account of my solicitors' [34] fees, or directly to my solicitors, by any Court, from the Trust Estate as a whole, on account of legal services rendered by them in any suit or suits which they instituted or participated in involving the subject matter above mentioned, but does not include anything which I may receive directly from the estate of Edwin Jennings, deceased, as distinguished from said Trust Estate, founded by the Will of John D. Jennings, deceased.

ESTELLE G. HOWLAND.

FRANCIS H. HOWLAND.

ACCEPTED:

HARRY A. DAUGHERTY,
ROBERT J. FOLONIE,
JOHN G. CAMPBELL,
HERMAN A. FISCHER, Jr."

By H. A. DAUGHERTY.

(Petitioner's Exhibit No. 2 for identification was offered and received in evidence as Petitioner's Exhibit No. 2 with the understanding that it would be connected up with further testimony.)

(Said document so offered and received in evidence was marked Petitioner's Exhibit No. 2 and made a part of this record).

(Testimony of Harry A. Daugherty.)

PETITIONER'S EXHIBIT No. 2.

(Petitioner's said Exhibit No. 2 for identification is identical with Petitioner's Exhibit No. 1 except that on the margin there was endorsed in longhand the following:)

“Chicago, Illinois, Jan. 30, 1924.

“In consideration of love and affection I hereby assign to Elizabeth M. Daugherty, my wife, an undivided one-half of my interest in and to this contract.”

“HARRY A. DAUGHERTY.”

[35] WITNESS.—(Continuing.) After that endorsement or assignment was made by me on Exhibit No. 2, I gave it to Mrs. Daugherty. She has had it ever since until the question arose with reference to my tax return. Then I asked her to get it and let me have it so I could turn it over to my attorneys. Except as I have indicated, it has been in her possession all of the time since it was delivered to Mrs. Daugherty in 1924. It bears date January 30th, 1924. The assignment is all in my handwriting and is over my signature.

(Counsel for petitioner then handed to the witness Petitioner's Exhibit No. 3 for identification. The witness stated that Petitioner's Exhibit No. 3 for identification was a letter.)

WITNESS.—(Continuing.) Petitioner's Exhibit No. 3 for identification is a letter I wrote to Mrs. Daugherty at the time I turned over the duplicate original contract with the assignment en-

dorsed on the margin. I delivered the letter to her at the same time I gave her the contract with the assignment on it.

(Petitioner's Exhibit No. 3 for identification was offered and received in evidence as Petitioner's Exhibit No. 3 without objection.)

(Said document so offered and received in evidence was marked Petitioner's Exhibit No. 3, and made a part of this [36] record.)

(Petitioner's Exhibit No. 3 is as follows:)

PETITIONER'S EXHIBIT No. 3.

"Dear Bess:

"You have often expressed the desire to build a home according to your own plans, and I had hoped to be able to be in a position to make it possible for you to realize your dream. However, circumstances have always seemed to prevent it. Some two or three months ago I made a contract with Estelle G. Howland of Ho-Ho-Kus, New Jersey, whom I had previously represented in some litigation, to represent her in connection with Mr. R. J. Folonie, J. G. Campbell and H. A. Fischer, Jr., in the prosecution of her claim against the estate of John G. Jennings, deceased, the same to be handled upon a contingent basis of 40% of the amount she might realize, said 40% to be divided equally between the above-named parties.

"If we are successful, Mrs. Howland will realize a very substantial amount, and the contingent fee will be correspondingly large. I am therefore assigning to you an undivided one-half interest in my share of whatever fees may be coming to me under

(Testimony of Harry A. Daugherty.)

the contract. I hope it will be sufficient to enable you to build the home, or if you should decide not to use it in that way, then I want you to feel at liberty to use the money in any way you see fit.

“I am attaching hereto a copy of the agreement on which I have noted your interest.

“With all my love, I am as ever,

(Signed) HARRY.”

WITNESS.—(Continuing.) I had nothing to do with the litigation after the contract was entered into, and I told Mrs. Howland that I would not have anything to do with the litigation. I first heard of the settlement along in March, 1926, or maybe [37] later, but I knew a settlement was to be made or likely to be made. The settlement was actually made in June, 1926; I do not remember the exact date. It came to my attention when Mr. Campbell called me up over the phone and told me the case had been settled and that he had received the money which was coming to Mrs. Howland and asked me to come over to his office.

(Counsel for petitioner then handed Petitioner's Exhibit No. 4 for identification to the witness.)

WITNESS.—(Continuing.) I remember distinctly seeing Petitioner's Exhibit No. 4 for identification on the date it bears, June 22, 1926.

(Counsel for petitioner then handed to the witness Petitioner's Exhibit No. 5 for identification.)

WITNESS.—(Continuing.) I received Petitioner's Exhibit No. 5 for identification from Mr. Camp-

(Testimony of Harry A. Daugherty.)

bell or Mr. Fischer, his partner, one or the other. It was in his office.

Petitioner's Exhibit No. 4 for identification is a check for my share of that amount of \$47,180.28, a check payable to my order.

Petitioner's Exhibit No. 5 for identification is a check given to me at the same time. It is payable to Mrs. Daugherty for \$47,180.28, which is the same amount as the check which was payable to me.

[38] I took Petitioner's Exhibit No. 5 for identification, which is a check payable to Mrs. Harry A. Daugherty, home with me that night and gave it to Mrs. Daugherty.

(Petitioner's Exhibits No. 4 and No. 5 for identification were offered and received in evidence without objection as Petitioner's Exhibits No. 4 and No. 5, respectively.)

(Said documents so offered and received in evidence were marked Petitioner's Exhibit No. 4 and Petitioner's Exhibit No. 5, respectively, and made a part of this record).

WITNESS.—(Continuing.) Mrs. Daugherty deposited the check in the bank in her account. In fact, she opened an account at the bank with a deposit of that check. She never did give me any part of it. She never did give me any proceeds of the \$47,180.28 in any way, directly or indirectly, and I never asked her for any. Probably if I had asked her, she would have, but I never asked her for it. I wanted Mrs. Daugherty to be a little bit independent. She never gave me one dollar of the

(Testimony of Harry A. Daugherty.)

income from any of the securities or property which she purchased with this money.

Cross-examination by Mr. SHEARER.

WITNESS.—At the time the checks were delivered to me there were present in Mr. Campbell's office Mr. John Campbell, Mr. Herman Fischer, Jr., and myself. Exhibits [39] No. 4 and No. 5 are the checks of Mr. Campbell and Mr. Fischer. Mr. Fischer, Jr., signed the checks on behalf of that firm.

The two checks were made out and delivered to me instead of one, pursuant to a conversation which I had had with Mr. Campbell in the fall of 1925 "in which I told him I had assigned one-half of my interest in the contract to Mrs. Daugherty and if anything did develop out of the litigation, she was to receive one-half."

I think that conversation was over the telephone, I am quite sure it was. The occasion for that conversation was, I think, that I called Mr. Campbell and asked him how the litigation was coming on, and he said they were having a pretty hot fight and that they were going along. I said: "Well, John, I just wanted to tell you now I have assigned one-half of my interest in contract to Mrs. Daugherty, if we ever get anything out of it, one-half of what is coming to me is to go to her." He said: "All right, Harry, I will have that in mind." There was no written understanding between the attorneys regarding the proportions that we were to share in the fee. There was a verbal understanding that

(Testimony of Harry A. Daugherty.)

we would each have one-fourth of 40%. There was no correspondence. I have known Mr. Campbell for over 25 years, and we have been very good friends, and we did not need any correspondence among ourselves.

Regarding the assignment, I do not know that I ever talked with Herman Fischer until I was over in Mr. Campbell's [40] office at the time the checks were given, but I do know that I talked with Mr. Folonie about it and what I had done, because Mr. Folonie and I had been office associates for five years in the general practice, and we were very close to one another. We got together from time to time to discuss the Jennings case, and I remember discussing it with him.

From November, 1923, to June, 1926, we discussed the case maybe half a dozen times. I could not tell exactly. Just when we would meet we would refer to the case, and some general conversation would ensue.

Mr. Folonie did not do anything in connection with the litigation. He never appeared in court, and he never handled the case. He never even met the client.

I could not tell you how many suits were instituted in that litigation. I presume that it is right that my name and Mr. Folonie's were placed on the bill as attorneys for the petitioner. I think Mr. Campbell, when he signed the pleadings, signed the names of Mr. Folonie and myself.

I drew the contract which has been introduced as

(Testimony of Harry A. Daugherty.)

Exhibit No. 1. I drew it for the purpose of setting out the terms on which the litigation was to be held. I intended that it should correctly reflect the understanding as to the fees which we were to receive.

Petitioner's Exhibit No. 3, which is the letter from myself to my wife, was prepared on the date it bears date, [41] January 30, 1924. I did not intend that the letter should change the terms of the assignment in any way. I may not have been quite as exact or explicit in the letter as I was in the assignment. That was simply a notification to her of what I had done. I just wanted to notify her in that letter that we had made a contract and that I was giving her a half interest in the contract. That was the sole purpose in writing the letter.

Mr. SHEARER.—“Petitioner's Exhibit No. 3 contains in part this:

‘Some two or three months ago I made a contract with Estelle G. Howland of Ho-Ho-Kus, New Jersey, whom I had previously represented in some litigation, to represent her in connection with Mr. R. J. Folonie, J. G. Campbell and H. A. Fischer, Jr., in the prosecution of her claim against the estate of John J. Jennings, deceased.’

It was your understanding, was it not, at the time you prepared this letter that that statement that you had made a contract to represent the client in connection with these other three men was correct?”

WITNESS.—“I think that is correct. It was a nominal representation so far as I was concerned,

(Testimony of Harry A. Daugherty.)

though, because all of the parties to the arrangement understood I was not to handle the litigation, nor have anything to do with the litigation.”

WITNESS.—(Continuing.) I remained with the Standard Oil Company of Indiana until July 1st of this year (1930). During that period I did [42] at one time take on outside legal employment in connection with the Estate of W. B. Cowan, who was the President of the company and who died, and I represented some interest in that Estate. It was almost because of my connection with the company, I might say. I got some fees out of it, but we were interested in seeing that the Estate was handled properly because of Mr. Cowan's long association with the company, and Mr. Robert Stewart, who was General Counsel for the company, was associated with me in that matter.

At the time I entered the employ of the Standard Oil Company I had other clients, but I dropped them just as rapidly as I could because of my connection with the company, severing my connections with my clients and devoting my time exclusively to the Standard Oil Company. At the time I entered the employ of the company I was in pending cases. I represented in particular one of the brewing companies in Chicago, where I was attorney of record in a number of cases, but withdrew quickly after my connection with the Standard Oil Company and they secured other counsel and my appearance was withdrawn and other counsel substituted.

(Testimony of Harry A. Daugherty.)

I do not recall any cases that I had pending in 1915 which I completed for the clients without substituting other attorneys. I was very anxious to get rid of my personal clientele on account of my connection with the company.

I made the arrangements in connection with this [43] Jennings litigation on account of the fact that Mrs. Howland was and had been my client and inasmuch as Mr. Campbell had told me that he thought she had a very substantial interest in the Estate, I was more anxious to make the arrangement with her, particularly so as I was not to have anything to do with handling the litigation.

I absolutely did not have any conversation with Mrs. Daugherty which modified in any way the written instrument which has been introduced here as Petitioner's Exhibit No. 2, or the letter, Exhibit No. 3.

I will say frankly there has been no secret understanding or arrangement between us. I do not know that Mrs. Daugherty has even made her will or if she has, it is without my knowledge. I have not asked her about it, and I have not touched a dollar of the money which I gave her by way of that assignment. I have advised her regarding some investments which she made when she asked me what I thought of them, but they were made entirely by her.

Exhibit No. 4, which is the check payable to my order, was deposited in the Illinois Merchants Trust Company. I made the deposit myself. The other

(Testimony of Harry A. Daugherty.)

check was not deposited by me. She made that for herself. That is my recollection because she had no account at that bank at that time, and I remember taking the check home to her and suggesting that she open an account with that bank. We were living out in Beverly Hills, one of the suburbs [44] of Chicago, and she had her account in the little Calumet Bank, and I did not want her to put that amount of money in a small outlying bank. I do not know under what circumstances the endorsement in the form of a receipt signed by the Illinois Merchants Trust Company on Exhibit No. 5 was made. That was some memorandum that the bank made. I do not know anything about it.

(Mr. Shearer, counsel for respondent, then read the endorsement on the back of Exhibit No. 5, which was as follows:

“Received \$47,180-28/100 as correct amount of this check.

ILLINOIS MERCHANTS TRUST COMPANY.”)

(Mr. Shearer stated that the endorsement was followed by a longhand signature which he could not read.)

WITNESS.—(Continuing.) Now, it may be, I am not clear about this, that I deposited that check and she came down the next day and signed the signature cards or that she took the check in herself and made that. I do not remember that, but I remember taking the check home and giving it to her, and I am sure she made the deposit herself and opened the account herself.

(Testimony of Harry A. Daugherty.)

Mr. SHEARER.—“If your Honor please, there is one other phase of this matter that I would like to cross-examine on, but the substance of that is already embodied in subparagraph C of paragraph 5 of the petition. The answer in this case, which [45] present counsel did not draw, has denied that allegation. In lieu of any further cross-examination on that, I ask leave to withdraw the denial in so far as it applies to subparagraph C of paragraph 5, and substitute in lieu of the denial an admission that the allegations contained in that subparagraph are true.”

Mr. HALLS.—“No objection.”

Mr. SHEARER.—“Respondent asks leave to amend the answer heretofore filed on January 31, 1929, by substituting in lieu of paragraph 5 of the answer as it now appears the following:

“(5) Admits the allegations contained in subparagraph C of paragraph 5 of the petition; but denies the remaining allegations contained in paragraph 5 of the petition.”

The MEMBER.—“The amendment will be allowed.”

Mr. SHEARER.—“I am through with the cross-examination.”

(Witness excused.)

TESTIMONY OF JOHN G. CAMPBELL, FOR
PETITIONER.

JOHN G. CAMPBELL, having been first duly sworn as a witness on behalf of petitioner, on direct examination testified as follows:

My name is John G. Campbell. I am an attorney at law in the city of Chicago and have been practicing there for 35 years. I have known the petitioner, Harry A. Daugherty, for 25 years.

[46] I had a conversation with him in 1923 with reference to the representation of Mrs. Howland in connection with an interest under the Trust Estate created by the will of John Jennings, deceased. This conversation took place in the early part of November, 1923, I would say the 5th of November, in view of the fact that I heard the contract read here. I had a prior conversation on November 5th. That was my first conversation with reference to the subject matter. Edwin Jennings died on October 31, 1923. On November 1st, the following morning, I called Mr. Daugherty on the telephone and asked him if he had noticed it in the paper, and he said that he had, and I told him that Mrs. Jennings, that was Edwin Jennings' brother's widow—would, in my opinion, have a large interest in John D. Jennings, father of Edwin Jennings, estate. He died—John D. Jennings died in 1889, leaving a will by which the estate was tied up in trust during the lifetime of his children, and I told him that we had briefed the subject some years ago, and that, in our opinion, Mrs. George F. Jen-

(Testimony of John G. Campbell.)

nings, who was then Mrs. *Mrs.* Howland would be entitled to a one-third of John D. Jennings' estate, and I told Mr. Daugherty that I would give him our brief, if he wished it.

“He said he could not take any litigation himself, but if we went on with the litigation, if Mrs. Howland wished to litigate the question, he would be glad to have us go along with [47] him, and my recollection is that on Sunday, which I think would be November 4th—I have not looked it up—on Sunday Mr. Daugherty told me that Mrs. Howland would be in his office on Monday morning, his office being in the Standard Oil Building down on Michigan Avenue, and he would like to have me come down there and meet Mrs. Howland. I went down there and met Mr. Daugherty and Mrs. Howland.

“Mr. Daugherty explained to Mrs. Howland and to me that he could not have any part in the litigation in case there was litigation, that his time was entirely taken up by his work with the Standard Oil Company, and Mrs. Howland told me that it would be perfectly agreeable to her if we should file a bill asking for the construction of the John D. Jennings' will, and I left Mr. Daugherty and Mrs. Howland in Mr. Daugherty's office, and that ended the conversation.”

Thereafter, we filed a bill for construction of the will, alleging that Mrs. Howland was entitled to one-third of the Estate, and we subsequently filed an amended bill which we have printed. My recollection is that it contained about 50 pages of printed

(Testimony of John G. Campbell.)

matter. There were a great number of defendants. We first argued a demurrer for two or three days before Judge Friend in the Circuit Court of Cook County, and then when the answers were filed, we took testimony before a Master. The Master's report was sent to court, and then we finally settled the whole Estate.

[48] The settlement was in June, 1926. Mrs. Howland received twenty times the check that I gave Mrs. Daugherty. I figured it up, and we received \$943,605.60. Mrs. Howland received 60% and Mr. Folonie received 10%. Campbell and Fischer received 20%, Mrs. Daugherty 5% and Mr. Daugherty 5%.

During the time the litigation was pending Mr. Daugherty did not participate at all in the conduct of the litigation. As far as I know he never read the bill of complaint. He had absolutely nothing to do. He never appeared in court. My talks with him were only to tell him from time to time that we had argued the demurrer or that we were taking testimony before the Master, but the details never. I arranged the details of the settlement on Mrs. Howland's behalf. The other party was represented by Mr. A. B. Williams of the firm of Castle, Williams, Long & Castle. Mr. Daugherty never was present at any time at those negotiations. I do not think I consulted him with reference to the settlement.

I have seen Petitioner's Exhibits Nos. 4 and 5 before. After we made the settlement with Mr.

(Testimony of John G. Campbell.)

Williams and we received the money, I told Mr. Daugherty that we had it, and I asked him to come over to the office so that we could figure out just what each one was entitled to, and Mr. Daugherty came to the office and met Mr. Fischer and me, and I told him exactly what we had received and then made out the two checks [49] representing Mr. Daugherty's share and Mrs. Daugherty's. These are the original checks.

I heard Mr. Daugherty's testimony in reference to the assignment of the one-half interest of his interest in the contract to Mrs. Daugherty. I had a conversation with Mr. Daugherty with reference to that assignment prior to the time the checks were delivered to Mr. Daugherty. My recollection is that the first conversation was over the telephone and fix it as some time in 1925. Mr. Daugherty told me he had assigned a one-half interest to his wife.

Cross-examination by Mr. SHEARER.

WITNESS.—I think the two checks were made out after Mr. Daugherty arrived at the office on that date. I did not call up Mrs. Daugherty and ask her to come to my office.

(Witness excused.)

TESTIMONY OF MRS. HARRY A. DAUGHERTY,
FOR PETITIONER.

Mrs. HARRY A. DAUGHERTY, being first duly sworn as a witness on behalf of petitioner, upon direct examination, testified as follows:

(Testimony of Mrs. Harry A. Daugherty.)

My name is Elizabeth M. Daugherty. I am the wife of Harry A. Daugherty, the petitioner, and am living with him now.

I have seen Petitioner's Exhibit No. 2 before. I saw it the night Mr. Daugherty brought it home, November 5, 1923. I received Petitioner's Exhibit No. 3. I received it at the time I received this letter. I received the letter on January 30, 1924. My statement that I received the contract on November 5, [50] 1923, was incorrect. I received the contract (Petitioner's Exhibit No. 2) with the letter.

The letter and the contract were in the nature of a surprise. Mr. Daugherty came home and handed me this letter. I had not an idea what was in it. When I read it, I was a bit overcome. He just simply said: "Here is a little surprise for you," or "present."

I do not know that he said anything to me about any litigation which was pending in connection with the Jennings Estate at that time. He just handed me this letter and said: "Read it. Here is something that may interest you," and I read the letter, of course.

I put the letter and assignment away in my desk. I kept them ever since. They have always been in my possession. They first left my possession when it was necessary in this question of income. Up until that time the letter was in my possession.

Yes, indeed, I have seen Petitioner's Exhibit

(Testimony of Mrs. Harry A. Daugherty.)

No. 5. It was brought to me on the evening of the day it was issued, June 22, 1926. I think I rushed over to the neighbors and showed them the check. I was very much excited over it. After that I deposited it in the Illinois Merchants, it is the Continental-Illinois now.

After I deposited the check in the bank I bought some [51] stocks. I rented a deposit box and put the stocks in the box. The stocks were issued in my name.

I have never given Mr. Daugherty any part of this money, this \$47,180.28. I have never given him any of the stock or securities that I purchased with the proceeds of the check. I have had no agreement with him by the terms of which I was to give him back directly or indirectly any part of this money. I never turned over to him any of the dividends from any of the securities or the stocks or the coupons from any of the bonds that I purchased with the proceeds of the check.

Cross-examination by Mr. SHEARER.

WITNESS.—I did not use the proceeds of the check to buy a home.

I do not believe I remember whether I personally deposited that check or sent it with my husband and then went down in a day or two and arranged to make the deposit. It is possible that he may have taken it down to the city with him the next morning because he often saves me the trouble of coming into town.

(Testimony of Mrs. Harry A. Daugherty.)

I did not make any arrangements to purchase any of the securities before I got the check.

Mr. HALLS.—“Petitioner rests.”

Mr. SHEARER.—“Respondent rests.”

[52] Petitioner tenders and presents the foregoing as a statement of the evidence material to the errors assigned in the petition for review filed in this cause and prays that the same may be settled and approved by the United States Board of Tax Appeals and made a part of the record in this cause.

(Sgd.) JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.

Respondent agrees that the foregoing is a correct and complete statement of the evidence material to the errors assigned in the petition for review filed in this cause and agrees that the same may be settled and approved and made a part of the record in this cause, without further notice to him of the lodging or the presentation thereof.

General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[53] Approved and ordered filed this 5th day of May, 1932.

(S.) STEPHEN J. McMAHON,
Member.

CAMPBELL & FISCHER
ATTORNEYS-AT-LAW

1542 FIRST NATIONAL BANK BUILDING

No. 1394

CHICAGO, June 22, 1928

PAY TO THE ORDER OF

Harry C. Montgomery

\$47,180.²⁸/₁₀₀

Forty seven thousand one hundred eighty and ²⁸/₁₀₀ DOLLARS

MEMBER FEDERAL RESERVE SYSTEM.

CAMPBELL & FISCHER

TO UNION TRUST COMPANY,
CHICAGO, ILL. (2-9)

BY *Wm. E. Keenan*

4-A

Pay to order of 4
William McFarley
Harry Montgomery

U. S. BOARD OF TAX APPEALS
D.V. 4-1908
DOCKETED
JUL 15 1930
PETITIONERS' EXHIBIT

U. S. BOARD OF TAX APPEALS
D.V. 4-1908
DOCKETED
JUL 15 1930
PETITIONERS' EXHIBIT

U. S. BOARD OF TAX APPEALS
D.V. 4-1908
DOCKETED
JUL 15 1930
PETITIONERS' EXHIBIT



CAMPBELL & FISCHER
ATTORNEYS-AT-LAW
1542 FIRST NATIONAL BANK BUILDING

No. 1395

CHICAGO, June 27 1924

Pay to the order of Mr. & Mrs. E. W. Dwyer \$ 771.80

Twenty seven hundred and one hundred eighty one and 80/100 DOLLARS
CAMPBELL & FISCHER

TO UNION TRUST COMPANY,
MEMBER FEDERAL RESERVE SYSTEM.
CHICAGO, ILL. (2-9)



5-a

Pay to order of
Delaware Merchants Trust
Mr. & Mrs. E. W. Dwyer
115 West 11th St. St. Louis, Mo.

AID THROUGH CHICAGO CLEARING HOUSE
JUN 27 1924
CHECKERS TO
MERCHANTS TRUST COMPANY

D.V. DIVISION
MADE FOR DEPOSIT
JUL 15 1930
PETITIONERS EXHIBIT
5

U. S. BOARD OF TAX APPEALS
DIV. 16 DOCKET 4/1908
JUL 15 1930
PETITIONERS EXHIBIT
5

RECEIVED
J. W. Dwyer
771.80 DOLLARS
AS CORRECT AMOUNT OF THIS CHECK.
MERCHANTS TRUST COMPANY

[56] Filed Apr. 20, 1932. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and transmit a transcript of the record in this cause to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript copies duly certified as correct of the following documents:

1. The docket entries of proceedings before the Board in the above-entitled cause;
2. Pleadings before the Board;
3. Findings of fact, opinion and decision of the Board;
4. Petition for review;
5. Statement of evidence as settled and approved;
6. Order or orders, if any, enlarging the time for the settlement of the statement of evidence and the preparation and delivery of the record. Not included in transcript.
7. This praecipe.

Said transcript to be prepared as required by law and the [57] rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ALBERT L. HOPKINS,
JAY. C. HALLS,
PETER L. WENTZ,

Attorneys for Petitioner.

Dated: This 20th day of April, A. D. 1932.

Receipt of a copy of the foregoing praecipe is hereby admitted this 20th day of April, A. D. 1932.

C. M. CHAREST,

Attorney for Respondent on Review.

Dated: This 20th day of April, A. D. 1932.

[58] DOCKET No. 41,905.

HARRY A. DAUGHERTY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE OF CLERK U. S. BOARD OF
TAX APPEALS TO TRANSCRIPT OF
RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 57, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of May, A. D. 1932.

[Seal]

B. D. GAMBLE,
Clerk.

[Endorsed]: No. 6856. United States Circuit Court of Appeals for the Ninth Circuit. Harry A. Daugherty, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed May 27, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

